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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAIME GUTIERREZ SALDANA, Defendant and Appellant.	G039677 (Super. Ct. No. 04SF1213) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William L. Evans, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Eric Swensen and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was sentenced to five years in prison for involuntary manslaughter, illegal gun possession and personally using a firearm. Relying on *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), he contends the court prejudicially erred in admitting his pretrial statements into evidence. He also maintains there is insufficient evidence to support the jury's findings he committed involuntary manslaughter and personally used a firearm. While appellant's *Miranda* contention may have traction, the statement in question was so clearly harmless, since it merely repeated what he told police at the hospital, that we find no reversible error. The evidence against him was sufficient to support his conviction, so we reject his claims and affirm the judgment.

FACTS

On the night of October 18, 2004, appellant went to Cristobal Ramirez and Victor Orozco's apartment to buy some marijuana from them. They were all sitting on a bed in a dimly lit room when Orozco reached under a pillow and produced a handgun. He asked appellant if he wanted to buy the weapon, and then he pulled back the slide several times to unload the clip. As he did, five or six bullets ejected from the gun. At one point, however, the slide jammed, and Orozco handed the gun to appellant, who passed it to Ramirez. Ramirez tinkered with the gun for a bit and then gave it back to appellant. Ramirez then stood up and went to close the door. When he did, appellant fired the gun, and the bullet struck Ramirez in the chest.

Panicked, appellant drove Orozco and Ramirez to the hospital and dropped them off at the emergency room. He then returned to their apartment, collected the gun, bullets and marijuana and took the items to a neighbor. After that, he went home, changed shirts and returned to the hospital. By then, around 10:15 p.m., Ramirez was dead, and the police had detained Orozco for questioning. Appellant was also detained and questioned at the hospital. He and Orozco both claimed they found Ramirez on the sidewalk and had nothing to do with his gunshot wound.

Sometime after midnight, appellant was placed in the back of a patrol car and transported to the Aliso Viejo sheriff's station, where, at around 3:30 a.m., he was

interviewed by Investigator Brian Sutton and his partner. Appellant was not handcuffed, and at the outset of the interview, Sutton told him, "You're under no obligation to talk to us. You're not under arrest." He also told appellant "at any point if you don't want to answer any questions, you're . . . free to do that." Appellant said he understood and proceeded to answer Sutton's questions. At no point did he object to the questioning or ask to end the interview.

Sutton testified that he conducted the interview in a low-key manner. Describing the interview as "informational," he said he just wanted to find out what appellant had been doing that night and how it was that he ended up taking Ramirez to the hospital. Throughout the interview, appellant stuck to his earlier story that he and Orozco simply found Ramirez on the sidewalk; he denied any involvement in Ramirez's fate. When the interview was over, at around 4:15 a.m., appellant was not arrested. But Sutton did have him remain at the station while he interviewed Orozco.

At first, Orozco offered the same story as appellant. However, he eventually told Sutton what really happened. Sutton then turned his attention back to appellant, and this time, he read appellant his *Miranda* rights. Although this second interview was not introduced into evidence, Sutton testified, "I do not think at any point during the interview we were very confrontational with him. He was cooperative with us and there was no reason to be confrontational." When the interview was over, Sutton had appellant wait at the station while he interviewed Orozco for a second time. Following that interview, Sutton arrested both Orozco and appellant.[1]

A forensic examination of the gun used in the shooting revealed it was a .32 caliber Colt automatic. The gun holds eight cartridges and requires four and one-half pounds of pressure to compress the trigger. It also has an automatic safety that is

[1] A week later, on October 25, Sutton interviewed appellant for a third time while he was out on bail. As with the second interview, the prosecution did not introduce this interview into evidence.

designed to prevent firing unless the shooter has his hand pressed against the back of the gun.

I

Appellant contends the trial court prejudicially erred in admitting his statements to Investigator Sutton into evidence. We disagree.

Before trial, appellant moved to suppress the statements on the ground he was not Mirandized before being interviewed. The court was initially inclined to grant the motion, given appellant had been transported to the police station in the back of a squad car. However, in the end, the court ruled appellant was not in custody for *Miranda* purposes at the time Sutton first interviewed him. Therefore it denied his motion to suppress.

Whether a suspect has been placed in custody for *Miranda* purposes depends on whether the totality of the circumstances "created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) As the reference to a *reasonable person* suggests, "[c]ustody determinations are resolved by an objective standard." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.)

Factors bearing on the custody issue include 1) whether the suspect was formally arrested before questioning; 2) the length of his detention; 3) where it occurred; 4) the ratio of officers to suspects; and 5) the demeanor of the officers. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and

whether the suspect was arrested at the conclusion of the interview. [Citation.]" (*People v. Pilster, supra,* 138 Cal.App.4th at pp. 1403-1404.)

In arguing appellant was not in custody during his initial stationhouse interview, the Attorney General points out appellant was not formally arrested or handcuffed before or immediately after the interview; Sutton told him he was not under arrest and was not required to talk to him; the nature of the questioning was low-key and nonaccusatory; and appellant never balked at any of Sutton's questions or asked to terminate the questioning. While these factors support the conclusion appellant was not in custody when Sutton first interviewed him, the circumstances leading up to the interview support the opposite conclusion.

The record shows it was shortly after 10 p.m. when appellant returned to the hospital, and soon after he arrived, the police contacted him in or near the parking lot for questioning. The questioning did not last very long, but appellant was detained at the hospital until Sutton arrived, which was after midnight. At that point, Sutton gave the order for further interrogation, and appellant was placed in the back of a patrol car and transported to the Sheriff's station. Starting at about 3:30 a.m., he was then interviewed for 45 minutes by Sutton and his partner. Then he was held at the station for further questioning.

Speaking to the location of the interview, the Attorney General correctly notes that "courts have repeatedly found the fact that an interview took place in the police stationhouse is insufficient alone to establish custodial interrogation." However, the cases he cites in support of this proposition are distinguishable from the present situation in one important respect: The defendants in those cases *voluntarily* agreed to come to the police station in the first place. (See *Oregon v. Mathiason* (1977) 429 U.S. 492, 493-495 [in finding stationhouse interrogation was noncustodial for *Miranda* purposes, court emphasized defendant "came voluntarily to the police station"]; *California v. Beheler* (1983) 463 U.S. 1121 [*Miranda* warnings are not required "if the suspect is not placed

under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 393 [defendant agreed to take polygraph exam at police station]; *People v. Stansbury* (1995) 9 Cal.4th 824, 828, 831-832 ["A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transporation or accepting a ride from the police, would not feel that he or she had been taken into custody."]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 131, 135 [police asked defendant if he would accompany them to the police station and said they would drive him home any time he wanted]; *People v. Spears* (1991) 228 Cal.App.3d 1, 21, 24 [police asked appellant if he would come down to the police station, and he agreed].)

Had appellant agreed to come to the police station in response to a request by the investigating officers, we would have no difficulty finding he was not in custody during the initial stationhouse interview. However, there is no evidence that is what occurred. Rather, the evidence indicates appellant had no say in the matter when he was placed in the back of a squad car and transported to the police station. Because of that, we are somewhat dubious of the Attorney General's assertion appellant was not restrained in a manner tantamount to arrest. Absent handcuffing and a formal announcement of arrest, there was not much more the police could do to signal to appellant he was under their control. Moreover, by the time Sutton got around to interviewing appellant at the police station, he had already been detained *for over five hours*. Taking all these factors into consideration, it appears appellant was in custody for *Miranda* purposes at the time the interview commenced.

However, any error that occurred by admitting appellant's statements into evidence was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [*Miranda* errors are subject to harmless error analysis].) Appellant argues his statements to Sutton were prejudicial because they "were used to obtain the

inculpatory statements made by appellant after he received his *Miranda* warnings." Sutton did question appellant two more times following the initial stationhouse interview, once at the station after giving him his *Miranda* rights, and once while he was out on bail. However, the prosecution did not introduce these subsequent interviews into evidence and appellant is unable to explain how he could have been prejudiced by them.

Admission of the initial stationhouse interview was somewhat damaging to appellant, in that it showed him to be a liar. This was not lost on the prosecutor, who contended in closing argument that appellant's false statements were indicative of his guilt. However, as the Attorney General rightly notes, the statements appellant made at the police station were not materially different from what he told the police earlier on at the hospital. At both locations, he claimed that he did not have anything to do with Ramirez's injuries and that he and Orozco just happened to come across Ramirez as he was limping along on the sidewalk. Therefore, even if the trial court had excluded what appellant told Sutton at the police station, the jury would still have known he lied to the police about what had happened. And since that was the most incriminating aspect of his interview, we are convinced beyond a reasonable doubt appellant would not have achieved a more favorable result had the court excluded his stationhouse statements. (See *Parsad v. Greiner* (2d Cir. 2003) 337 F.3d 175, 185-186 [despite *Miranda* violation, cumulative nature of challenged statements rendered their admission harmless]; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 245-246 [same].)

II

Appellant also contends there is insufficient evidence to support his conviction for involuntary manslaughter. Again, we disagree.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the

judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

"'One commits involuntary manslaughter either by committing "an unlawful act, not amounting to a felony," or by committing "a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."'" (*People v. Abilez* (2007) 41 Cal.4th 472, 515, citing Pen. Code, § 192, subd. (b).) The latter theory, which the prosecution relied on here, "requires proof of criminal negligence — that is, 'aggravated, culpable, gross, or reckless' conduct that creates a high risk of death or great bodily injury and that evidences a disregard for human life or indifference to the consequences of the conduct. [Citations.]" (*People v. Garcia* (2008) 162 Cal.App.4th 18, 27.)

Appellant admits he was negligent in shooting Ramirez, but he insists he was not *criminally* negligent because he saw Orozco unloading the gun and "had every reason to believe the gun was empty when [he] handed [it] to him." The problem with this argument is that Orozco testified that although he attempted to unload the gun by repeatedly pulling back the slide, and this did in fact cause about five or six bullets to be ejected from the gun, the slide eventually jammed, which prevented him from finishing the job. He then handed the gun to appellant, and he passed it over to Ramirez, who tried to fix it. Then, without further attempting to unload the weapon, he handed it back to appellant. At that point, appellant should have known the gun might still be loaded. Although he apparently didn't mean to shoot Ramirez, that does not excuse his conduct: "A showing of criminal negligence, as required for involuntary manslaughter, may be made without proving a specific or general intent on the part of the defendant." (*People v. Velez* (1983) 144 Cal.App.3d 558, 565.) It is enough that appellant failed to perceive the risk of fiddling with the trigger of a potentially loaded gun with two people in his immediate vicinity. Such conduct is sufficient to support his conviction for involuntary manslaughter.

III

Lastly, appellant contends there is insufficient evidence to support the jury's finding he personally used a firearm within the meaning of Penal Code section 12022.5. Again, we cannot agree.

Penal Code section 12022.5 provides for a sentence enhancement when the defendant "personally uses a firearm in the commission of a felony or attempted felony[.]" (Pen. Code, § 12022.5, subd. (a).) For purposes of this provision, personal use means "to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it." (Pen. Code, § 1203.06, subd. (b)(3); *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319.) The defendant need not subjectively intend to utilize the firearm; rather, it is sufficient if he intentionally commits one of the proscribed acts of displaying, firing, striking or hitting. (*In re Tameka C.* (2000) 22 Cal.4th 190, 198-199; *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1494-1495.)

Although there is no evidence suggesting appellant displayed the gun or touched Ramirez with it, the record does show he intentionally fired the weapon. Orozco's testimony clearly placed the gun in appellant's hand at the time of the shooting. And while appellant claims the gun went off by accident, there was expert testimony the weapon could only be fired if someone was holding the grip and exerting four and one-half pounds of pressure on the trigger. From that evidence, the jury could reasonably infer appellant personally used the gun by firing it intentionally – that is, volitionally – at Ramirez. We may not second-guess the jury's reasonable finding to that effect.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.